Supreme Court, U. S.
FILED
JUL 2 1976
MICHAEL RODAK, JR., CLERK

76-1911

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No.

ROBERT F. AHEARN ET AL.,
APPELLANTS,

v.

ROBERT J. DI GRAZIA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
THREE-JUDGE COURT.

Jurisdictional Statement.

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BATEMAN & SLADE, INC. BOSTON, MA.

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Jurisdictional Statement.

The Opinions Below.

The memorandum decision of the United States District Court for the District of Massachusetts (Three-Judge Court), as yet unreported, appears herein as Appendix B, *infra*. The memorandum decision of the United States District Court for the District of Massachusetts on the appellants' motion for a temporary restraining order and request to convene a Three-Judge Court is unreported, and appears at Appendix A, *infra*. No other written opinions have been delivered.

Jurisdiction.

This action was instituted by appellants in the United States District Court for the District of Massachusetts under 28 U.S.C. §§ 1343(3), 2281, 2284 and 42 U.S.C. § 1983 to enjoin the appellee from imposing punishment duty pursuant to M.G.L. c. 31, § 43(g), and to declare M.G.L. c. 31, § 43(g), unconstitutional and unenforceable.

On May 6, 1976, a Three-Judge Court, convened pursuant to 28 U.S.C. §§ 2281 and 2284, filed an opinion holding that M.G.L. c. 31, § 43(g), is constitutional. A notice of appeal to this Court was filed on May 19, 1976. The jurisdiction of this Court to review the decision of the District Court on direct appeal in conferred by 28 U.S.C. § 1253.

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Amendment XIV:

> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Massachusetts General Laws, chapter 31, § 43(g):

> "(g) Punishment duty shall not be imposed without just cause upon any police officer or fire fighter subject to this chapter. A police officer or fire fighter upon whom

> punishment duty is imposed shall, within twenty-four hours of the imposition of such punishment duty, be given a copy of this section and of section forty-five, together with a written notice stating the specific reason for the imposition of such punishment duty and the duration thereof and informing him that he may, within forty-eight hours of receipt of such notice, request in writing a hearing by the appointing authority, and if he so requests he shall be given a hearing within five days of receipt of such request by the appointing authority. A copy of the notice of imposition of punishment duty shall be forwarded forthwith to the personnel administrator. Whenever such hearing is given, the appointing authority shall give the police officer or fire fighter upon whom the punishment duty is imposed a written notice of his finding within two days after the hearing. If, after such hearing, the appointing authority finds no just cause exists for the imposition of punishment duty, such punishment duty shall be deemed not to have been imposed; if, after such hearing, the appointing authority finds that just cause does exist for the imposition of punishment duty, the police officer or fire fighter upon whom the punishment duty is imposed may appeal to the commission as provided in paragraph (b), and he or the appointing authority shall be entitled to judicial review of the action taken by the commission as provided in paragraph (d). The provisions of paragraph (c) shall apply to all hearings under this paragraph. Notice of any action taken by the appointing authority under this paragraph shall be forwarded forthwith to the personnel administrator."

Questions Presented.

1. Whether the imposition of punishment duty which consists of forced labor without compensation as a condition of continued employment on police officers and firemen as authorized by M.G.L. c. 31, § 43(g), is repugnant to the Equal Protection Clause of the Fourteenth Amendment.

2. Whether the imposition of punishment duty pursuant to M.G.L. c. 31, § 43(g), which neither provides for review at a meaningful time and in a meaningful manner nor limits the amount of punishment duty that may be imposed in aggregate or in a given day is in violation of the Due Process Clause of the Fourteenth Amendment.

Statement of the Case.

The facts in this case are not disputed. The appellee, the police commissioner of the city of Boston, had imposed punishment duty in the form of 80 hours of overtime duty without pay upon the appellants, who are four Boston police officers. The imposition of forced overtime without pay as punishment duty is authorized by M.G.L. c. 31, § 43(g). It is applicable to policemen and firemen, but to no other kinds of public employees. On October 22, 1975, the appellants filed a civil action in the United States District Court for the District of Massachusetts pleading the unconstitutionality of M.G.L. c. 31, § 43(g), and requesting the convening of a Three-Judge Court to hear said constitutional challenge.

On January 9, 1976, the court below ordered the convening of a Three-Judge Court and granted the appellants' request for a temporary restraining order to prevent the imposition of punishment duty pursuant to M.G.L. c. 31, § 43(g) (Appendix A). On April 28, 1976, the Three-Judge Court convened and heard oral argument. The Three-Judge Court issued a memorandum decision on May 6, 1976, dismissing the appellants' constitutional challenge of M.G.L. c. 31, § 43(g), and vacating the temporary restraining order (Appendix B).

On May 13, 1976, the appellants requested an injunction from the Three-Judge Court for the purpose of perfecting their appeal to this Court pursuant to 28 U.S.C. § 1253. On May 21, 1976, the appellants' request for injunctive relief was denied (Appendix C). On June 1, 1976, the appellants applied to this Court for a stay of the Three-Judge Court judgment pending perfection of their appeal pursuant to 28 U.S.C. § 1253. On the same day, Justice William J. Brennan, Jr., denied the appellants' application for a stay (Appendix D).

The Questions Presented are Substantial.

The questions presented by this appeal are of substantial importance to the type of discipline a governmental employer may impose on police officers and firefighters. M.G.L. c. 31, § 43(g), singles out the aforesaid civil service employees for the imposition of punishment duty which must be performed as a condition of their continued employment. A similar statute cannot be found in any other jurisdiction.

The District Court's application of the rationality standard as employed by this Court in testing the constitutionality of a state statute was in error in the instant case. The District

Court's reliance on *Kelley* v. *Johnson*, 44 U.S.L.W. 4469 (April 5, 1976), a recent decision of this Court, was misplaced and constituted a misinterpretation of the rationality standard. Simply stated, the District Court's decision holds that a police officer, by virtue of his employment, is *per se* precluded from *ever* having standing to raise an equal protection challenge of a state statute.

In *Kelley*, of *critical* importance to this Court in sustaining a hair regulation for a municipal police department was the present existence of a de facto uniformity in appearance for the overwhelming majority of state and local police attributed to the wearing of a uniform. On the basis of this fact, this Court ruled that an apparent conscious decision has been made by state and local authorities that "similarity in appearance of police officers is desirable." *Kelley*, *supra*, at 4472. Thus, this Court concluded in *Kelley*, that a rational justification for a hair regulation for a municipal police department had been made so as to defeat a Fourteenth Amendment challenge.

In the instant case, there does not exist in other jurisdictions a disciplinary statute which imposes punishment duty for policemen and firemen or for any other civil service employees. In contrast to the *Kelley*, situation, no justification exists for M.G.L. c. 31, § 43(g), on the basis of the practice in other municipalities.

It is further contended that to conceive a justification, as the court below did, for punishment duty in contrast to the usual sanction of suspension from duty, on the basis that a suspension may have the effect of reducing available manpower in a period of an emergency, is unwarranted. There already exists in the Boston police department as well as in other state and local police departments complete and detailed provisions as to the deployment of police personnel during

emergency situations. The promotion of safety of persons and property is not advanced by the imposition of punishment duty during an emergency situation.

The imposition of punishment duty is in direct contrast to an emergency situation. The appellants are compelled to perform 80 hours of work without pay as a condition of their continued employment, regardless of the existence of an emergency. Presumably, if an emergency situation arose during the performance of the said punishment duty, the hours of overtime which the appellants had to work would not be credited to their punishment duty, but rather would be considered paid overtime. It should also be noted that emergency overtime applies to all patrolmen alike, whereas punishment duty, by its very nature, is directed to a particular individual.

The contention, as noted by the court below, that punishment duty may also be justified on the basis of the usual sanction of suspension from duty places an inappropriate economic burden on the policeman's family is equally frivolous. It is totally inconceivable for a statute such as M.G.L. c. 31, § 43(g), to be enacted so that a policeman's or a firefighter's family could be protected while at the same time disciplinary action is taken. Furthermore, if protection of the family is the justification for M.G.L. c. 31, § 43(g), what justification exists to impose punishment duty rather than a suspension on single policemen and firemen? Even assuming, *arguendo*, the validity of M.G.L. c. 31, § 43(g), due to the purported family rationale, what justification exists for limiting the concern to the families of policemen and firefighters and not to the families of other governmental employees? Finally, M.G.L. c. 31, § 43(g), provides no guidelines as to when the appointing authority may impose punishment duty in the interest of the employee's family and when he is required to resort to the usual sanction of suspension.

Thus, in accord with the rationality standard adopted by this Court, see, *e.g.*, *Reed* v. *Reed*, 404 U.S. 71 (1971); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *James* v. *Strange*, 407 U.S. 128 (1972); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), it is the appellants' contention that M.G.L. c. 31, § 43(g), lacks a rational relationship to its presumed stated objective of special disciplinary procedures for policemen and firemen. The classification set forth by M.G.L. c. 31, § 43(g), serves only to degrade and humiliate the public employees subjected to it. In light of the existence of several types of disciplinary actions already permitted under M.G.L. c. 31, § 43, the dissimilar treatment given to policemen and firemen under M.G.L. c. 31, § 43(g), bears no rational relation to the presumed purpose of special disciplinary action for these civil service employees. Therefore, the classification set forth by M.G.L. c. 31, § 43(g), must fail as being in violation of the Equal Protection Clause as well as the Due Process Clause of the Fourteenth Amendment. The conceived justifications for M.G.L. c. 31, § 43(g), set forth by the court below are so clearly without merit that review by this Court is warranted.

Conclusion.

The questions presented by this appeal are substantial and of public importance. The case is one of first impression. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

ROBERT F. AHEARN, ET AL.,
PLAINTIFFS,

v.

CIVIL ACTION
No. 75-4419-S

ROBERT J. DI GRAZIA,
DEFENDANT.

Memorandum and Order on Motion for Temporary Restraining Order and Request to Convene a Three-Judge Court.

January 9, 1976.

SKINNER, D. J.

The facts are undisputed. The defendant Police Commissioner of Boston has imposed punishment duty in the form of 80 hours of overtime without pay upon the plaintiffs, who are four Boston patrolmen. The imposition of forced overtime without pay as punishment is inferentially authorized by M.G.L. c. 31 § 43(g). It is applicable to policemen and firemen, but to no other kinds of public employees.

The plaintiffs claim that the statute is unconstitutional on two grounds, and seek the convening of a three-judge court so that its enforcement may be enjoined. 28 U.S.C. § 2281. The first is that punishment duty is involuntary servitude in violation of the Thirteenth Amendment of the Constitution, and the second is that the statute violates the Equal Protection Clause of the Fourteenth Amendment.

This Court is not obliged to apply for the convening of a three-judge court unless it is satisfied that there is a substantial federal question. There is no substantial federal question under the Thirteenth Amendment, since any of the plaintiffs may avoid punishment duty by resigning from the police force. *United States* v. *Shackney*, 333 F.2d 475, 476-477 (2nd Cir. 1964).

A large number of cases hold that by reason of the nature of a policeman's duty he may be subject to regulations and disciplinary procedures which are different from those imposed on other public employees. In each case, however, this holding has been dependent upon a showing by the superior authority of some reasonable relationship between the police function and the regulation involved. *Gardner* v. *Broderick*, 392 U.S. 273, 277-278 (1968); *Owen* v. *Barry*, 483 F.2d 1126 (2nd Cir. 1973); *Board of Selectmen of Framingham* v. *Civil Service Comm.*, 321 N.E.2d 649 (1974). Consequently, the issue cannot be disposed of summarily. There are no cases with respect to this particular kind of disciplinary provision and it, therefore, cannot be said that the law is so settled that there remains no open substantial federal question.

While there is a pending proceeding before the Civil Service Commission concerning the appropriateness of the penalty and the sufficient cause for its imposition, it is not likely that those proceedings will resolve the issue presented here. Furthermore, the resolution of any issue of abstention or equitable restraint is properly left for a three-judge court. *Apel* v. *Murphy*, _____ F.2d _____ (1st Cir. December 1, 1975).

Accordingly, I shall refer this matter to the Chief Judge of the Circuit for the convening of a three-judge court.

The plaintiffs have also sought a temporary restraining order. Since the issue raised by the equal protection claim is an open question of law, as I see it, I cannot fairly say that I believe the plaintiffs have a likelihood of success on the merits.

The argument, however is not frivolous, and if a temporary restraining order is not entered the plaintiffs' case is very likely to become moot before it can be considered by a three-judge court.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that the defendant be temporarily restrained from requiring the plaintiffs to perform punishment duty in the form of uncompensated overtime until further order of the Court.

WALTER JAY SKINNER,
United States District Judge.

Appendix B.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

ROBERT F. AHEARN, ET AL.,
PLAINTIFFS,

v.

ROBERT J. DI GRAZIA,
DEFENDANT.

CIVIL ACTION
No. 75-4419-S

Before CAMPBELL, Circuit Judge, FREEDMAN and SKINNER, District Judges.

Memorandum and Order.

May 6, 1976.

SKINNER, D. J.

The plaintiffs, all police officers of the City of Boston, claim that they have been deprived of equal protection of the law by reason of the imposition on them of punishment duty pursuant to Massachusetts General Laws, c. 31, § 43(g), and bring this claim under the Civil Rights Act, 42 U.S.C. § 1983. Since they seek to enjoin the operation of the Massachusetts statute, a three-judge district court was designated on January 14, 1976 by the Chief Judge of the Circuit, in accordance with 28 U.S.C. §§ 2281 and 2284.

The thrust of the plaintiffs' claim is that only police officers and firefighters are singled out for this form of punishment. No other civil service employee of the Commonwealth may be subjected to punishment duty.

An additional claim under the Thirteenth Amendment and 42 U.S.C. § 1994 was dismissed by a district judge prior to the convening of the three-judge court.

There is no dispute as to the facts. After a hearing conducted in accordance with M.G.L. c. 31 § 43(g), the defendant Police Commissioner found the plaintiffs guilty of violating specified rules and regulations of the Boston Police Department and imposed punishment duty. Punishment duty consists of performing extra hours of police work without pay. An appeal was taken to the Massachusetts Civil Service Commission, which is still pending. The district judge issued a temporary order restraining the performance of the duty in order to preserve the issue for this Court.

The standard to be applied has recently been clarified by the United States Supreme Court. The plaintiffs must demonstrate that there is no rational connection between the provision for enforcing discipline through punishment duty and the promotion of safety of persons and property. *Kelley* v. *Johnson*, 44 U.S.L.W. 4469, 4472 (April 5, 1976).

"The job of a policeman does have 'natural distinguishing characteristics' from all other city employees." *Detroit Police Officers Association* v. *City of Detroit*, 385 Mich. 519, 190 N.W. 2d 97 (1971), *appeal dismissed for want of substantial federal question*, 405 U.S. 950 (1972).

Defendant has pointed out that the usual sanction of suspension from duty may place an inappropriate economic burden on the policeman's family, or may have the effect of reducing the available manpower in a period of emergency. Where, as in this case, the infractions consist of unauthorized absence from duty, suspension compounds the problem from the viewpoint of protection of persons and property. The defendant argues that Massachusetts was therefore justified in providing an alternate sanction by punishment duty.

We agree that these considerations demonstrate a rational relationship to the protection of persons and property, and that this relationship is at least as strong as that of the hair length regulation sustained in *Kelley* v. *Johnson*, *supra*, and that of the residence requirement in *Detroit Police Officers Association* v. *City of Detroit*, *supra*. Plaintiffs argue that no other state imposes punishment duty as does Massachusetts. The state is entitled to make its own choice if the standard or rational connection is met, as we hold it is here. *Kelley* v. *Johnson*, *supra*.

Accordingly, the Temporary Restraining Order is VACATED, and the Complaint is DISMISSED on the merits. So ordered.

LEVIN H. CAMPBELL,
Circuit Judge.

FRANK H. FREEDMAN,
District Judge.

WALTER JAY SKINNER,
District Judge.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

ROBERT F. AHEARN, ET AL.,
PLAINTIFFS,

v.

ROBERT J. DI GRAZIA,
DEFENDANT.

CIVIL ACTION
No. 75-4419-S

Before CAMPBELL, Circuit Judge, FREEDMAN and SKINNER, District Judges.

Judgment of Dismissal.

May 6, 1976.

SKINNER, D. J.

This action came on for argument, the facts having been stipulated, and upon due consideration thereof, it is ORDERED, ADJUDGED and DECREED that the defendant recover of the plaintiffs his costs of action.

LEVIN H. CAMPBELL,
Circuit Judge.

FRANK H. FREEDMAN,
District Judge.

WALTER JAY SKINNER,
District Judge.

Appendix C.

UNITED STATES DISTRICT COURT.
DISTRICT OF MASSACHUSETTS.

ROBERT F. AHEARN, ET AL.,
PLAINTIFFS,

v.

ROBERT J. DI GRAZIA,
DEFENDANT.

CIVIL ACTION
No. 75-4419-S

Before CAMPBELL, Circuit Judge, FREEDMAN and SKINNER, District Judges.

Order.

May 21, 1976.

SKINNER, D. J.

The plaintiffs' motion for an injunction pending appeal from the Order dismissing the Complaint is DENIED.

LEVIN H. CAMPBELL,
Circuit Judge.

FRANK H. FREEDMAN,
District Judge.

WALTER JAY SKINNER,
District Judge.

Appendix D.

SUPREME COURT OF THE UNITED STATES.
OFFICE OF THE CLERK.
WASHINGTON, D. C. 20543

June 1, 1976

Frank J. McGee, Esquire
1952 Ocean Street
Marshfield, Massachusetts 02050

RE: Robert F. Ahearn, et al. v. Robert J. Grazia, No. A-1055

Dear Mr. McGee:

Your application for stay in the above-entitled case has been presented to Mr. Justice Brennan, who has endorsed thereon the following:

"Denied
Wm. J. Brennan, Jr.
6/1/76."

Very truly yours,
MICHAEL RODAK, JR., *Clerk*,
By PETER K. BECK,
Assistant Clerk.